Supreme Court, U. S.
FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1672

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN L. LEA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 19, 1980. A petition for rehearing was denied on March 24, 1980 (Pet. App. C). The petition for a writ of certiorari was filed on April 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conduct constituted fraud within the contemplation of the mail fraud statute (18 U.S.C. 1341).

2. Whether the mailings upon which petitioner's convictions were based had a sufficient nexus to the fraud.

3. Whether the admission of proof of other similar conduct on petitioner's part was an abuse of discretion.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 20 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of two years' imprisonment on each count and a fine of $1000 on each of the first ten counts, for a total fine of $10,000. The court of appeals affirmed, with one judge dissenting (Pet. App. A1-A10).

Petitioner, the purchasing agent and manager of the meat buying department of the Midwest Buying Office of Safeway Stores, Inc., was charged with devising, and causing the use of the mails to execute, a scheme to defraud his employer of its right to have its business conducted honestly, of its right to his faithful services, and of certain secret profits that he obtained in the performance of his official duties (Pet. App. A14-A15). As set forth in the opinion of the court of appeals (*id.* at A2-A4), the evidence showed that petitioner was responsible for the purchase at wholesale of fresh meat for ultimate sale in Safeway's retail food stores. The procedure used by Safeway was to publish specifications of its immediate needs so that interested suppliers or brokers could extend offers, usually by telephone. Safeway's buyer would accept the most favorable offer by telephoning the low bidder and conveying a purchase order number. Company policy forbade the disclosure to bidders of competing offers or any indication of price

relativity.[1] Buyers were encouraged to deal directly with suppliers, but were required to abide by the suppliers' wishes if the latter desired to transact business through a broker; in an average year, 97% to 98% of the company's national carcass beef requirements were filled by direct purchases from suppliers rather than through brokered transactions (*id.* at A2-A3).

The scheme to defraud, which began in 1966, consisted of the payment of kickbacks to petitioner by Mutual Brokerage Service, a meat brokerage business, in return for petitioner's assistance in getting meat suppliers to place their orders through Mutual.[2] The kickbacks were paid out of an account in which Mutual deposited its commissions on the orders it placed with Safeway for its client suppliers (Pet. App. A3-A4). Before instituting this arrangement Mutual had been unable to do any significant business with Safeway's Midwest Buying Office; in the eight years thereafter, Mutual accounted for more than 50% of Safeway's midwest carcass beef purchases, earned $537,350 in commissions, and paid $29,000 in kickbacks to petitioner (*id.* at A4). As part of the scheme, petitioner—contrary to express company

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[1]Company policy also forbade buyers, upon pain of immediate dismissal, to accept gifts or favors from those doing business with the company, and provided that a buyer accepting gifts or favors could be required to account for the value of whatever he received (Tr. 48-49; G.X. H). On October 15, 1969, in response to a question on a form that all branch managers were required to fill out, petitioner answered "no" to the question whether in the past five years he had received anything of value from any supplier (Tr. 65, 68; G.X. F) and signed a written acknowledgement that he occupied a fiduciary or confidential position with the company and owed it a continuing duty of loyalty and good faith (Tr. 69).

[2]The two proprietors of Mutual were named in the indictment as unindicted participants in the fraudulent scheme (Pet. App. A14). Both testified for the government.

policy—would disclose to Mutual both the content of competitors' offers and Safeway's anticipated future requirements; he would also direct Mutual to specific suppliers that he believed would enable Mutual to offer a competitive price (*id.* at A3). Two suppliers testified that they were contacted by Mutual after they had tried unsuccessfully to do business directly with petitioner. Offers similar in price and quantity to those rejected by petitioner were thereafter accepted when tendered through Mutual (*ibid.*).

ARGUMENT

1. The court of appeals correctly held (Pet. App. A5 n.3) that petitioner's scheme constituted a "fraud" within the meaning of the mail fraud statute. Contrary to petitioner's contention (Pet. 14-16), proof of tangible loss is not an essential element of the mail fraud offense. *United States* v. *Bohonus*, No. 79-1449 (9th Cir. Mar. 27, 1980), petition for cert. pending, No. 79-6532; *United States* v. *Louderman*, 576 F. 2d 1383, 1386-1388 (9th Cir.), cert. denied, 439 U.S. 896 (1978). A private employer is no less entitled than a public employer to the honest and faithful services of its employees. *United States* v. *Bohonus*, *supra*; *United States* v. *Hasenstab*, 575 F. 2d 1035, 1038-1039 (2d Cir.), cert. denied, 439 U.S. 827 (1978); *Abbott* v. *United States*, 239 F. 2d 310, 314 (5th Cir. 1956). Safeway, in short, was entitled to have petitioner deal with suppliers and make his purchasing decisions with its best interest in mind, not as a means of enriching himself. As the court of appeals noted (Pet. App. A5 n.3), the payment of kickbacks to a purchasing agent must inevitably be reflected in higher costs to the purchaser, even though the precise amount of additional cost may not be readily identifiable. In any event, the indictment charged that Safeway was defrauded of

petitioner's secret profits (*i.e.*, the kickbacks)—profits which, as a matter of law, rightfully belonged to Safeway. Tangible loss was thus alleged and proved. *United States* v. *Bohonus*, *supra*.[3]

The decision below does not, as petitioner asserts, conflict with decisions of other courts of appeals. The cases on which petitioner relies for his claim of conflict (*United States* v. *Dixon*, 536 F. 2d 1388 (2d Cir. 1976), *United States* v. *McNeive*, 536 F. 2d 1245 (8th Cir. 1976), and *United States* v. *Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979)) all adhere to the principle that, as *Dixon* phrases it, "a scheme to use a private fiduciary position to obtain direct pecuniary gain is within the mail fraud statute." 536 F. 2d at 1399; see also *United States* v. *McNeive*, *supra*, 536 F. 2d at 1249; *United States* v. *Rabbitt*, *supra*, 583 F. 2d at 1025. A violation of the mail fraud statute was held not to have been established in *Dixon* because the scheme at issue—unlike the one involved in this case—contemplated neither pecuniary loss to anyone *nor* direct pecuniary gain to the defendant. See 536 F. 2d at 1399; see also *id.* at 1400-1401. In *McNeive*, the mail fraud statute was held not to have been violated because the defendant did not receive—as in this case—kickbacks in reward for the exercise of his discretionary judgment, but rather received only unsolicited gratuities for his exercise of a ministerial duty. See 536 F. 2d at 1250, 1251. The mail fraud conviction in *Rabbitt* was reversed because the actions for

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[3]The jury was instructed that, if it found that petitioner had accepted monies and kickbacks from Mutual, it could find that he had engaged in a scheme to defraud Safeway of his loyal and faithful services, even though no actual monetary loss to Safeway was shown (see Pet. 16 n.3). A finding that petitioner had accepted kickbacks, however, was of necessity a finding that he had defrauded Safeway of his secret profits and hence had caused the company tangible loss.

which the defendant received remuneration were not—as here—undertaken in his official capacity (see 583 F. 2d at 1024-1026); on one other mail fraud count, involving payments to the defendant for action he did take in his official capacity, his conviction was upheld. See *id.* at 1022-1023.

2. The mailings charged by the indictment to be in furtherance of the fraudulent scheme fell into three categories: written confirmations of the sale of meat through Mutual to Safeway, sent by Mutual to suppliers; statements detailing Mutual's brokerage commission charges on sales to Safeway, sent by Mutual to suppliers; and checks in payment thereof sent by suppliers to Mutual (Pet. App. A5). Petitioner claims (Pet. 17-22) that the link between these mailings and the scheme was too attenuated to sustain his conviction; and the dissent in the court of appeals was based upon this point (Pet. App. A10). As the court of appeals majority correctly pointed out (*id.* at A6-A8), however, the essence of the ~~scheme~~ scheme was that petitioner would direct Safeway business to Mutual and receive a kickback from Mutual's profits thereon. The mailings, which were ordinary business practices of a meat broker, were therefore a foreseeable result of and an essential part of the scheme. Without them, Mutual would have been unable to collect its brokerage profits and, accordingly, would have had neither the funds with which to pay kickbacks to petitioner nor any incentive to make such payments. The mailings simply were not remote from the fraudulent

scheme in the same fashion as those found insufficient to sustain the convictions in the decisions on which petitioner relies (Pet. 19-22).[4]

3. The district court admitted, for the purpose of showing motive and intent, evidence that, sometime subsequent to the initiation of the kickback scheme between petitioner and Mutual, petitioner offered to steer Safeway business to another brokerage firm in return for part of the brokerage commissions. For the reasons set forth by the court of appeals (Pet. App. A8-A9), the admission of this evidence was not an abuse of discretion.[5]

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[4]In *Parr* v. *United States*, 363 U.S. 370 (1960), and *United States* v. *Tarnopol*, 561 F. 2d 466 (3d Cir. 1977), the mailings (in *Parr*, assessment notices, tax bills and tax payments; in *Tarnopol*, packing slips) would have occurred even had there not existed, in each case, a fraudulent scheme to misappropriate the funds to which the mailings related. Here, Mutual's business dealings with Safeway were substantially a product of the fraudulent kickback scheme and the mailings thus would otherwise not have occurred. In *Kann* v. *United States*, 323 U.S. 88 (1944), the mailings were from the bank that cashed the fraudulently procured checks to the bank upon which the checks were drawn, for the purpose of collection. Neither bank was a party to the fraud, and the mailings occurred after the defendants had procured the proceeds of the fraud; the mailings thus were of no assistance in consummating the fraud. Here, the mailings were from or to Mutual, a party to the fraud, and were steps in the collection by Mutual of funds out of which petitioner received his share.

In *United States* v. *Brown*, 583 F. 2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), the mailings by a finance company of a repayment coupon book to a borrower and of a subsequent letter telling him that a new book would be issued to him were totally tangential to the scheme to defraud the finance company by a false loan application and to defraud the borrower into making a spurious investment (see 583 F. 2d at 665-668); conviction on another count was, on the other hand, upheld where the defendants mailed a request for financing with the intent to embezzle the proceeds of the sale of the items financed. *Id.* at 668-669.

[5]Petitioner argues (Pet. 22) that the court of appeals found no abuse of discretion because it misread the record and erroneously thought that the kickback scheme was initiated by him rather than by

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

JUNE 1980

Mutual. The relevance of the evidence concerning the offer to the other firm remains the same, however, regardless of who initiated the scheme for which petitioner was tried.

DOJ-1980-06